Supreme Court, U.S.
FILED

97 • 457 JUN - 2 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ROLLAND WEDDELL,

Petitioner,

v.

BRUCE I. HOCHMAN, an individual and HOCHMAN, SALKAN and DeROY, a Professional Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTION PRESENTED

Whether the application of State of Nevada Supreme court case, *Morgano v. Smith*, 879 P.2d 735, and California Appellate Court Case, *Weiner v. Mitchell, Silberger, & Knupp*, 114 Cal. App. 3d 39 (1981), denied Petitioner his right to assistance by counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Rolland Weddell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-5a) is unreported. The opinions of the District Court (App., 6a-25a) are also unreported.

JURISDICTION

The Court of Appeals entered its Memorandum Decision on March 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, are the sixth and fourteenth amendments to the Constitution of the United States.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the assistance of counsel for his defense**. (Emphasis Added)

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** (Emphasis Added)

STATEMENT OF THE CASE

As interpreted by the District Court below, and affirmed by the Ninth Circuit Court of Appeals, Nevada, Supreme Court Case, *Morgano v. Smith*, 879 P.2d 735 (Nev. 1994), together with California Appellate Court Case, *Weiner v. Mitchell, Silberberg, & Knupp*, 114 Cal. App. 3d 39 (1981) removes all responsibility for the negligence and fraud, respectively, of a private attorney representing a client that is guilty of the offence charged. A guilty client has no recourse against a negligent private attorney, regardless of the injuries caused by the attorney's negligence. And, even worse, a guilty client has no recourse against a fraudulent private attorney, regardless of the injuries caused by the attorney's fraud. Where an attorney

can neglect the interests of his client, and even fraudulently misadvise his client with impunity, the client is deprived of his right to assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

I. The Underlying Lawsuits

Petitioner, ROLLAND WEDDELL, brought suit against Respondents, BRUCE I. HOCHMAN, and his law firm, HOCHMAN, SALKIN AND DeROY, for negligence and legal malpractice. Respondents acted as Petitioner's attorneys, before charges were brought, and then after several months negotiating, they represented Petitioner against criminal charges in the matter of United States of America v. Rolland P. Weddell, Case No. CR-N-90-68-HDM. In that case, Petitioner, entered a plea of guilty, and was sentenced to seven months in prison; which seven months were served by Petitioner.

Petitioner, retained Respondent Hochman, as his attorney in a tax case, before charges were brought against him. After several months negotiating, Hochman represented Petitioner against criminal charges in the matter of United States of America v. Rolland P. Weddell, Case No. CR-N-90-68-HDM. In that case, Petitioner entered a plea of guilty, and was sentenced to seven months in prison; which seven months he served.

Petitioner contends that Respondent Hochman fraudulently induced Petitioner to enter a plea of guilty and then fraudulently induced him to forego an appeal of the wrongful and illegal sentence imposed upon him. When Petitioner filed each of the two Complaints filed in this

matter, he was not asking for civil damages for being found guilty; he was asking for civil damages for allowing an excessive and illegal sentence; for permitting the consideration, without challenge of the Government's Sentencing Memorandum, full of false statements and grand jury testimony; and for allowing that Sentencing Memorandum to become a public record, which later resulted in the denial of Petitioner's application for a contractor's license.

When Petitioner first retained Respondent Hochman, Hochman told Petitioner that the criminal aspects of this case would be simple; but the civil aspects would be very complicated. In fact, exactly the opposite has come to pass. Since Petitioner's sentencing and his serving seven months in prison, acting In Pro Per, with relative ease, Petitioner has settled the civil aspects of his case with the Internal Revenue Service. As of September 30, 1994, Petitioner has also settled and concluded the criminal aspects; but that part of the matter has been a nightmare.

In settling the criminal aspects of his case, Petitioner was not satisfied with Judge Magistrate, Atkins' Order, particularly with respect to her denial of Petitioner's motion for an order vacating the balance of fines and for an early termination of probation; accordingly Petitioner appealed to Judge McKibben.

Judge McKibben heard Petitioner's appeal on September 30, 1994 and amended the Judgment. The effect of Judge McKibben's Amended Judgment in a Criminal Case, was to terminate supervised probation; reduce Petitioner's fines by $15,000; eliminate restitution in the amount of $500,000; and obtain an agreement from the

government that it would not file any further criminal charges concerning the facts and circumstances that led to the filing of the information in this case. Moreover, ***and perhaps most important***, Judge McKibben ordered the Government's Sentencing Memorandum sealed.

With respect to the underlying criminal charges, Petitioner pled guilty to misdemeanor, willful failure to file income tax returns, for 1985 and 1986. During that period of time, Petitioner was falsely accused of murder. It goes without saying that his life was in total turmoil. He did not file tax returns for those years, **but his failure to file was not willful**. After the State of Nevada dropped all murder charges against him, in 1987, Petitioner went to his accountant, Michael Montelatici, and asked him to prepare returns and bring Petitioner within the law. Shortly thereafter, Petitioner learned of the IRS investigation and retained Respondent Hochman to represent him, although no charges had yet been brought.

From the beginning Respondent Hochman recommended pleading guilty to misdemeanor charges. For practical reasons, Petitioner reluctantly agreed and the offer was made. When after many months, the IRS did not accept Petitioner's offer, Petitioner instructed Hochman to withdraw the offer. Hochman did, but within hours the IRS called back and accepted Petitioner's offer.

Just before sentencing, the Government Sentencing Memorandum was served. Petitioner read therein unfounded allegations that were taken from grand jury testimony, and page after page of unfounded "historical" information, far removed from the Statement of Facts that

Petitioner had agreed to and on which the Plea Agreement was based. Respondent did not object to the Sentencing Memorandum, nor did he respond to it. At that time Petitioner asked Respondent Hochman if Petitioner could withdraw his guilty plea. Respondent Hochman erroneously told him that he could not; that it was too late.

Petitioner entered a plea of guilty because Respondent Hochman told him to. In the face of the wrongful Government Sentencing Memorandum, Petitioner stayed with his guilty plea, not because he thought his failure to file tax returns was willful, but because Respondent Hochman, erroneously told him that he had no choice but to do so.

On September 30, 1994, Judge McKibben allowed Petitioner to withdraw his guilty plea. At that point, Petitioner could have entered a plea of not guilty, and could have gone to trial and exonerated himself. If Petitioner were still serving his sentence and would have obtained an early release, it would have made sense; or even if Petitioner had been convicted of a felony, it would have made sense to get that felony off his record. But since Petitioner had already served the sentence and could not get seven months of his life back, there was no point in subjecting himself to the expense and trauma of another criminal trial.

II. Proceedings Below

As is explained below, Petitioner filed two separate actions against Respondents. Both were dismissed; and

both were appealed. The issues in each action were essentially the same, and the Ninth Circuit Court of Appeals dealt with the two cases together in its unpublished Memorandum.

In his Complaint and First Amended Complaint for the first action, Petitioner, contended that Respondents negligently failed to properly represent him in determining whether to enter a plea; in negotiating the plea agreement as it pertained to sentencing; with respect to sentencing; and with respect to whether an appeal should have been taken as to the sentencing.

Trial was originally set for July 26, 1994, but because of a full Court calendar, it was continued to November 1, 1994. Just prior to the November 1, 1994 trial date, Respodents brought a Motion to Dismiss, based on (at that time) the very recent Nevada Supreme Court combined decisions of *Jerome J. Morgano, Appellant v. James E. Smith, Esq., Respondent* and *Andre Schoka, Appellant v. Jerome Polaha, Respondent*, 1994, reported at 879 P.2d 735 (Nev. 1994). On October 31, 1994, one day before the date set for trial, Respondent had a heart attack and Respondents filed a Motion for Continuance.

Respondents' Motion to Dismiss was granted, with leave for Petitioner to amend. The Court denied Respondents' Motion for Continuance based on the granting of the Motion to Dismiss and the vacating of the November 1 Trial Date. Accordingly, on or about, November 30, 1994, Petitioner filed a Second Amended Complaint alleging that he did in fact obtain post conviction relief and that he was innocent of the charges alleged against him and at the *very same* time sought leave to file a Third

Amended Complaint, setting forth a cause of Action for Fraud. Respondents then filed a second Motion to Dismiss based on Judicial Estoppel and Collateral Estoppel. Petitioner, of course, opposed this second Motion to Dismiss.

While the Court considered this second Motion to Dismiss, it was necessary for Petitioner to protect the statute of limitation on the issue of fraud. Accordingly, on February 27, 1995, Petitioner filed, but did not serve, a new, second action entitled ROLLAND WEDDELL v. BRUCE I. HOCHMAN, et al., District Court Case No. CV N 95-119-DWH. This second action contained the same allegations of fraud and breach of fiduciary duty contained in the proposed Third Amended Complaint, but of course it did not include the allegations of professional malpractice, since the statute of limitations for negligence had already run and was lost.

On May 4, 1995, in the first action, the Court granted the Motion to Dismiss and at the same time denied the Motion to File a Third Amended Complaint, on the grounds that it was untimely. Accordingly, Petitioner filed his appeal in the first action ROLLAND WEDDELL v. BRUCE I. HOCHMAN, et al., Court of Appeals Docket Number: 95-16116, District Court Case No. CV N 93-327-DWH.

Upon being served with the Summons and Complaint of the second action, on June 20, 1995, Respondents filed their Motion to Dismiss the second action. Petitioner opposed the Motion, but on January 2, 1996, judgment was entered dismissing Petitioner's second Complaint

with prejudice. Petitioner appealed, but the Ninth Circuit Court of Appeals affirmed both Judgments.

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important

The issues determined in this matter involve one of the most important rights we enjoy as citizens of this country; the Sixth Amendment right to assistance of counsel. As interpreted by the District Court below, and affirmed by the Ninth Circuit Court of Appeals, Nevada, Supreme Court Case, *Morgano v. Smith*, 879 P.2d 735, and the California Appellate Court Case, *Weiner v. Mitchell, Silberberg, & Knupp*, 114 Cal. App. 3d 39 (1981), remove all responsibility for the negligence, or even fraud, of a private attorney representing a client that is guilty of the offence charged. A guilty client has no recourse against a negligent and/or fraudulent private attorney, regardless of the injuries caused by the attorney's negligence and/or fraud. Where an attorney can neglect the interests of his client with impunity, the client is deprived of his right to assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

II. The Decision of the Court of Appeals Is Erroneous

The interpretation of *Morgano* and *Weiner*, below was erroneous and it should not be applied to **excessive** sentencing cases.

Petitioner raised the constitutional issue for the first time on appeal in No. 95-16116, the first action appealed

from. While the Ninth Circuit acknowledged that it is within its discretion to consider issues raised for the first time on appeal, it is the general rule not to do so, and the Court saw no reason to depart from that rule. It is respectfully submitted that there are extremely compelling reasons for departing from the general rule.

Petitioner, Weddell believed that the requirements for *Morgano* had been fulfilled, in his Second Amended Complaint, of the first action, Docket No. 95-16116; and certainly had been fulfilled by allegations of fraud, in the second action, Docket No. 96-15219.

The rule that an appellate court will refuse to rule on questions not raised below, is not without exception. *Silber v. United States*, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962); *Vance v. Terrazas*, 444 U.S. 252, 62 L.Ed.2d 461, 100 S.Ct. 540, rehearing denied, 445 U.S. 920, 63 L.Ed.2d 606, 100 S.Ct. 1285 (1980). This is especially so when the interests of fundamental justice will be served. *Trailways Lines, Inc. v. Trailways, Inc., et al.*, 785 F.2d 101, 7 EBC 1188 (1986, CA 3 Pa.).

In refusing to depart from the general rule, the Ninth Circuit cited *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985), but it ignored the later Ninth Circuit case *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986), which also cited the *Bolker* case, but made explicit the exception to the general rule as follows:

> This court will generally not consider an issue raised for the first time on appeal. *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). Three exceptions to this rule exist: (1) in an "exceptional" case when review is necessary to prevent a miscarriage of justice or to preserve

> the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in law, or (3) when the issue is purely one of law and the necessary facts are fully developed.

In the instant matter, two of the three exceptions are applicable. First, review is necessary to prevent a miscarriage of justice **and** to preserve the integrity of the judicial process. Second, this is a matter that involves an issue which is purely one of law, and the necessary facts are fully developed.

It is respectfully submitted that for the reasons stated below in this Petition, the *Morgano* and *Weiner* decisions, as interpreted and applied by the District Court and the Ninth Circuit Court of Appeals, are bad law. Justice and the integrity of the judicial process requires that they be disregarded.

Finally, the issue of whether a guilty client has the right to effective representation by counsel; and his remedies if he is denied that representation, is strictly a question of law, and should be determined once and for all.

In reaching its decision, the Nevada Supreme Court stated, "We now hold that, to state a claim for legal malpractice against private criminal defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction or sentence was caused by something other than the plaintiff's own conduct." The Court then went on to establish the test for implementing that standard, stating that in order to avoid a Summary Judgment or the granting of a Motion to Dismiss, the Plaintiff must

show post conviction relief, ***and*** in order to prevail at trial the Plaintiff must prove actual innocence of the underlying charge. *Under these tests a guilty client has no meaningful right to the assistance of counsel. Counsel doesn't even have to show up.*

In the *Wiener* matter, discussed in more detail below, Plaintiff, Wiener, had a trial on the merits of the criminal charges against him, and was found guilty. The Court took judicial notice of the opinion setting forth the facts on which the conviction was based and determined that Wiener was convicted because of the crimes that he had committed and not because of anything that Defendants had done or failed to do. The instant matter is very different. Petitioner, Weddell did not have a trial on the merits. He entered a plea of guilty, **because Respondents told him to**.

Since *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), it has been well established that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." With *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) and *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), these considerations became directly applicable to the states.

It wasn't long before the Court in *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), determined that not only does a person have a right to counsel, but that person has a right to **effective** assistance of counsel. In *Evitts v. Lucey, supra*, the Court said "a

party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." In fact, in many cases that party may be worse off, since he is relying on advice of his counsel instead of watching out for his own interests.

The cases in this area of the law, particularly *United States v. Cronic*, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984), indicate that the most obvious case of ineffectiveness would be the case where counsel did not act as his client's advocate, either because he was somehow prevented from doing so, or he simply failed to make the effort. The *Cronic* Court stated at page 659 that,

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) stated at page 685 that,

> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample

> opportunity to meet the case of the prosecution" to which they are entitled. (Citations Omitted)
>
> . . . That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

In the instant matter, Respondent Hochman was little more than "a person who happens to be a lawyer" present alongside the Petitioner during the proceedings. Whether negligently or intentionally, he did not subject the prosecution to the required "adversarial testing" and as a result, his client served seven months in prison that he should not have had to serve.

Financial responsibility and accountability, while not sufficient, is absolutely essential to assure that the advocate will take his responsibility seriously and provide his client with the "adversarial testing" that is necessary for a fair trial and a fair sentence.

As erroneously interpreted by the District Court and the Ninth Circuit Court of Appeals, the State of Nevada, by way of decision of its Supreme Court; and the State of California, by way of decision of its Appellate Court, has

interfered with the traditional attorney client relationship, insulating the attorney from that financial responsibility and accountability that is so essential to effective assistance of counsel.

As has been set forth above, there were two actions involving the same parties; both actions were dismissed by the District Court and both dismissals were appealed to the Ninth Circuit Court of Appeals. The first action was for professional negligence and the second action was for fraud and breach of fiduciary duty. In dismissing the first of the two actions for negligence, the District Court specifically relied on *Morgano*. In dismissing the second of the two actions, for fraud and breach of fiduciary duty, the District Court specifically relied on the *Weiner* case. In doing so, however, the District Court took judicial notice of the entire file of the first action, and incorporated its interpretation of the reasoning of the *Morgano* case in its order. Petitioner respectfully submits that the District Court should not have applied *Morgano* to either of the two actions, but even if *Morgano* is applied, Petitioner complied with the provisions of *Morgano*, and it was therefore error to grant Defendants' Motion to dismiss Petitioner's Complaint for fraud, and it was error for the Ninth Circuit to affirm.

A. Application of *Morgano* as Error. It was error to apply *Morgano* to either of the two actions brought by Petitioner, Weddell, for two reasons. First, a distinction must be made between negligence in the obtaining of the conviction of the guilty client and negligence in the obtaining of an excessive sentence of a guilty client. Second, the circumstances of Petitioner's case, satisfy the requirements of *Morgano*.

1. Distinction between negligent conviction and negligent excessive sentence. A distinction must be made between negligence in the obtaining of the conviction of a guilty client, and negligence in the obtaining of an excessive sentence of a guilty client. It makes perfect sense to forbid a guilty client from suing his attorney, simply because somewhere along the way to that conviction the attorney was negligent. Under those circumstances, the client's guilt and the commission of a crime is what resulted in his conviction; not the act or omission of his attorney. It does not make perfect sense, or any other kind of sense, to forbid a guilty client from suing his attorney when it was the attorney's negligence that resulted in an excessive sentence.

Petitioner, did not bring either of the actions to complain about his conviction. This was not a lawsuit about Respondents' representation of Petitioner so far as the underlying offenses were concerned; although he could have so complained, as will be discussed below. Petitioner's actions have to do with the sentence he received, which was far in excess of what he would have received, but for Respondents' negligence and fraud.

The *Morgano* case, along with its companion case, *Schoka v. Polaha*, 879 P.2d 735, holds that the Plaintiff must plead appellate or post-conviction relief and must also plead innocence to state a claim for malpractice. However, both of those cases, as well as, *all* of the cases cited by the court to support its decision, involved cases where the *conviction* itself was brought into question. See *Shaw v. State, Dept. of Admin., PDA*, 816 P.2d 1358, 1360 (Alaska 1991); *Stevens v. Bispham*, 316 Ore. 221, 851 P.2d 556, 561, 566 (Or. 1993); *Glenn v. Aiken*, 409 Mass. 699, 569 N.E.2d

783, 788 (Mass. 1991); *Carmel v. Lunney*, 70 N.Y.2d 169, 511 N.E.2d 1126, 1128, 518 N.Y.S.2d 605 (N.Y. 1987); and *Heck v. Humphrey*, 129 L.Ed.2d 383, 114 S.Ct. 2364 (June 24, 1994). Moreover, in the *Morgano* case, the direct appeal from the judgment of conviction was dismissed; and in the *Schoka* case, the appeal from an order dismissing the petition for post-conviction relief was dismissed. Here, Petitioner brings his sentence into question; not the underlying conviction. Moreover, Petitioner has sought and obtained post-conviction relief in relation to the sentence.

In every case this writer found, and Respondent cited no cases to the contrary, guilt was irrelevant if the defense attorney's error concerns the extent or severity of the sentence. For example, one of the cases relied on to reach the decision in *Schoka*, was *Stevens v. Bispham, supra*. While that case certainly held, as the Nevada Supreme Court pointed out, "for a convicted criminal to maintain a legal malpractice action against former defense counsel, the plaintiff must allege exoneration of the underlying offense through reversal on direct appeal, post-conviction relief or other means." But the *Stevens* Court, at page 562, then went on to say that,

> At least one other consideration is pertinent. However a person comes to be convicted, whether by a plea to the charge, through a plea agreement, or after a trial to judge or jury – for the purposes of a case like this one, the person convicted is deemed equally guilty. Many prisoner complaints in this area will relate to the failure of counsel to get a "better deal" for the accused. But many "better deals" will relate to

> terms of a sentence or of probation. **Such complaints would not result in a reversal of a conviction, either outright or for a new trial. It is only in these latter circumstances, however, that a legal malpractice action will be available.** (Emphasis Added.)

In all the cases this writer found, where the Court specifically considered an excessive sentence, the court never considered the client's undisputed guilt to be an issue. For example, in *Geddie v. St. Paul Fire & Marine Insurance Company,* La.App., 354 So.2d 718, the client was sentenced to four years for a crime that carried a maximum penalty of two years. Due to the negligence of his attorney, Geddie actually served eight months longer than he should have. To complicate matters, because of disciplinary problems, Geddie was required to serve some of the extra time in a maximum security facility. The appellate court reduced Plaintiff's award from $45,000 to $12,000 because it found that the more severe conditions of the maximum security facility were due to Plaintiff's own misconduct; but it did not even consider the idea that because Geddie was guilty of the underlying criminal charge, he deserved whatever sentence he received, and his attorney should not be liable for the excessive term.

Likewise, in *Lawson v. Nugent,* 702 F.Supp. 91 (D.N.J. 1988), the Plaintiff was permitted to prove damages for emotional distress attributable to twenty months of confinement in a maximum security penitentiary in excess of what he should have served, which was allegedly due to negligent representation by his defense attorney. Again

there was no consideration of the Plaintiff's undisputed guilt.

The courts are saying that a guilty person is not entitled to civil damages for being found guilty, despite his or her lawyer's negligence. Petitioner is not asking for civil damages for being found guilty! He is asking for civil damages for allowing an excessive and illegal sentence; for permitting the Magistrate to consider, without challenge, the Government's Sentencing Memorandum, full of false statements and grand jury testimony; and for allowing that Sentencing Memorandum to become a public record, resulting in the denial of Petitioner's application for a contractor's license.

In reaching its determination the District Court, quoted the *Morgano* Court stating that "to state a claim for legal malpractice against private criminal defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction or sentence was caused by something other than the plaintiff's own conduct." It is respectfully submitted that if an attorney negligently, or worse still, intentionally allows his client to be sent to prison for jaywalking, even though the client did in fact jaywalk, he should be permitted to show that the sentence was "caused by something other than the plaintiff's own conduct."

2. The circumstances of Petitioner's case, satisfy the requirements of *Morgano*. Petitioner obtained post conviction relief, and has a colorable claim of innocence.

(a). Petitioner Obtained Post Conviction Relief. Petitioner was told by Respondent Hochman that the criminal aspects of his case would be simple; but the civil

aspects would be very complicated. In fact, exactly the opposite has come to pass. Since his sentencing and his serving seven months in prison, acting on his own behalf, Petitioner has with relative ease, settled the civil aspects of his case with the Internal Revenue Service. As of this writing, he has also settled and concluded the criminal aspects; but that part of the matter has been a nightmare.

Following a series of motions and hearings before Magistrate Judge Atkins, Judge Atkins found that Weddell appeared to have been improperly canvassed concerning his rights, as required by Rule 11, when the Court accepted his guilty plea on March 1, 1991.

Judge Atkins stated that " . . . the Court finds ***three*** (emphasis added) reasons to amend the sentence it imposed upon Weddell." In addition to the improper canvassing mentioned above, Judge Atkins wrote,

> Second, Weddell was improperly sentenced to a term of imprisonment on the second count of the information, which charged him with willful failure to file a corporate income tax return for the tax year 1985. . . .
>
> Finally, the Court will technically amend the provision in the sentence concerning the payment of unpaid taxes for the subject tax years as restitution. . . .

Petitioner was not satisfied with Judge Atkins' Order, particularly with respect to her denial of his motion for an order vacating the balance of fines and for an early termination of probation; accordingly he appealed it to Judge McKibben. Thus the September 30, 1994 hearing before Judge McKibbin, during which Judge McKibben very significantly amended Petitioner's Judgment.

The effect of Judge McKibben's Amended Judgment in a Criminal Case, was to teminate supervised probation; reduce Plaintiff's fines by $15,000; eliminate restitution in the amount of $500,000; obtain an agreement from the government that it would not file any further criminal charges concerning the facts and circumstances that led to the filing of the information in this case. Moreover, ***and perhaps most important***, Judge McKibben ordered the Government's Sentencing Memorandum sealed. All of this was accomplished by Petitioner, Weddell, In Pro Per.

With respect to the Government's Sentencing Memorandum, at page 5 of Judge Atkins' Memorandum and Order, at Page 83 of the Excerpt of Record for Docket No. 95-16116, she wrote,

> It is noted that Weddell continues to object to this Court's reliance on the Government's sentencing memorandum (Doc. #14) which contains historical, yet relevant (*see* 18 U.S.C. § 3622(a) (2)) information. ***Mr. Weddell had the opportunity to object to the memorandum at the time of sentencing, and failed to do so.*** (Emphasis Added.) Further despite his technical criticisms of the memorandum, he has not provided this Court with any evidence (in fact, hardly any argument) that the memorandum is inaccurate. Therefore, the Court does not see any harm in relying on the memorandum.

Actually it was Respondent Hochman that had "the opportunity to object to the memorandum at the time of sentencing, and failed to do so." In fact he failed to even file a written response, which meant that during the Sentencing Hearing, the only thing Judge Atkins had

before her was the Government's Sentencing Memorandum. Petitioner contends that it was this failure, among other failures of Respondent Hochman, that precipitated the seven months sentence to prison.

Given the fact that Petitioner has already served his sentence, and those seven months can never be given back to him, as a practical matter, Petitioner could not have obtained any more post-judgment relief than he did.

(b). Petitioner alleged a colorable claim of innocence. Petitioner pled guilty to misdemeanor, willful failure to file income tax returns, for 1985 and 1986. During that period of time, Petitioner was defending himself against a charge of murder. It goes without saying that his life was in total turmoil. He did not file returns for those years, but his failure to file was not willful. After the State of Nevada dropped all murder charges against him, in 1987 Plaintiff went to his accountant, Michael Montelatici, and asked him to prepare returns and bring Petitioner within the law. Shortly thereafter, Petitioner learned of the IRS investigation and retained Respondent Hochman to represent him, although no charges had yet been brought.

From the beginning Respondent Hochman recommended pleading guilty to misdemeanor charges. Petitioner, for practical reasons, reluctantly agreed and the offer was made. When after many months, the IRS did not accept the offer, Petitioner, instructed Hochman to withdraw the offer. Hochman did, but within hours the IRS called back and accepted Petitioner's offer.

Just before sentencing, the Government Sentencing Memorandum was served on Respondent Hochman.

Petitioner read therein unfounded and improper allegations that were taken from grand jury testimony, and page after page of unfounded and improper "historical" information, far removed from the Statement of Facts on which the Plea Agreement had been based. At that time Petitioner asked Respondent Hochman if he could withdraw his guilty plea. Respondent Hochman erroneously told him he could not, that it was too late.

In granting both of Respondents' Motions to Dismiss, the District Court found that Weddell (Petitioner) is collaterally estopped from making his claim of legal malpractice, as well as, fraud and breach of fiduciary duty against Respondents. The District Court quoted *United States v. Bejar-Matrecious*, 618 F.2d 81, 83 (9th Cir. 1980) to the effect that "The general rule is that the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea." What is ironic, is that in that very case, the Ninth Circuit refused to consider the previous judgment, saying that "In this case, we think that introduction of the prior judgment was reversible error. Evidence of a prior conviction that conclusively establishes a material element of a crime would normally be highly probative. The manner in which the Government introduced the copy of Bejar's prior judgment, however, substantially diminished its probative value."

In the instant matter, the fact that Weddell pled guilty is obviously probative, but where it is alleged that the guilty plea in question was induced by negligence and/or fraud of the Respondent attorney being complained against, it seems obvious that the probative value is greatly diminished by the prejudice to the Petitioner.

Moreover, in *Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980), the United States Supreme Court recognized that collateral estoppel cannot apply where the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the earlier matter.

In the instant matter, as the District Court below pointed out, Petitioner pled guilty to charges alleged against him twice. However, the first time he pled guilty, he did so based on the advice of Respondent, and as a result of Respondents' poor representation; the very reasons we are now engaged in the suit and this Petition. The second time he pled guilty, he did so because he had little, if anything to gain by entering a plea of not guilty. He had already served seven months in prison, that he could not get back. To go to the expense and agony of a very protracted trial, for no other reason than to solidify his civil case against Respondents, would have been ludicrous, unjust and anything but a "full and fair opportunity" to litigate the earlier matter.

Perhaps an even more compelling reason is that the *Morgano* decision was not rendered until August 10, 1994. On September 30, 1994, Weddell entered his second guilty plea, less than two months later. Hochman did not file his Motion to Dismiss, based on *Morgano* until October 10, 1994. A reasonable inference is that if Weddell had known of the *Morgano* decision, requiring innocence as a prerequisite to pursuing a cause of action for negligence, he could have, and would have entered a plea of not guilty and gone to trial, despite the fact that he had already served his sentence.

B. Application of *Weiner* as Error. It was error to apply *Weiner* to the case at bar, because *Weiner* is so clearly distinguishable. Weiner, the Plaintiff, was a certified public accountant, who after an investigation by the Securities Exchange Commission for securities fraud, was indicted for securities fraud in accounting practices and willfully making untrue statements to the Commission and the New York Stock Exchange. After his conviction, on six counts of securities fraud in accounting practices and four counts of willfully making untrue statements to the Commission and the New York Stock Exchange, Weiner brought suit against the attorneys that had represented him during the investigation, but not during his trial. In the Complaint he alleged causes of action in tort against the attorneys for malpractice, conspiracy, fraud, breach of fiduciary duty, and interference with prospective advantage. The Court took judicial notice of the opinion setting forth the facts on which the conviction was based and determined that Wiener was convicted because of the crimes that he had committed, and not because of anything that Defendants had done or failed to do.

First, this is just one more case in a long line of cases cited by the District Court below that deals with a conviction; not an excessive sentence. But more important, Weddell's circumstances are very different. In the *Wiener* matter, Plaintiff, Wiener, had a trial on the merits of the criminal charges against him, and was found guilty. Weddell did not have a trial on the merits. He entered a plea of guilty, **because Respondents told him to**. Moreover, as set forth above, Weddell has a colorable defense; there is

no indication in *Weiner* that Weiner maintained his innocence throughout the trial and during his civil suit.

Wiener was convicted after a trial and he was not complaining of an excessive sentence. All of the harm he complained of was the result of his conviction, for which there was ample evidence in the record that he deserved. There was no allegation in that case that the sentence he received was excessive; there was no allegation that his counsel advised him to plead guilty; there was no allegation that the sentence was illegal; there is no allegation that the harm came not as a result of the conviction, but because the Defendant negligently or intentionally allowed an improper Sentencing Memorandum to become a public record. Where these allegations, or the like, have been made, the Courts have found for Plaintiff.

Still another case, cited by the District Court below, which speaks only to a conviction and not to the issue of an excessive sentence, is *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), by the Supreme Court of Texas. In that case, as in all the other cases, the Plaintiff was convicted of crimes, and brought suit against the attorney, whose negligence she claimed resulted in her conviction. In this case, she did not claim innocence; she alleged that the government had offered her transactional immunity through her attorney, and her attorney had failed to advise her. The majority joined the Courts in Nevada, California and several other states. It is the concurring and dissenting opinions that make this case most interesting and instructive.

In concurring, Justice Hightower said, "Even though the Court concludes that Peeler's own conduct is the sole

proximate or producing cause of her indictment and conviction, the holding today should not be perceived as condoning the alleged conduct of Hughes & Luce and Jordan which, *if true*, is reprehensible and unconscionable."

Three Justices, including Chief Justice Phillips dissented, stating as follows:

> The Court bases today's holding in large part on its belief that all criminal acts are so reprehensible that permitting someone convicted of a crime to recover against his or her former attorney for professional negligence "would shock the public conscience, engender disrespect for courts and generally discredit the administration of justice." *Supra* at 497. **The public morality is thus protected at the expense of shielding all criminal defence attorney malpractice, no matter how egregious, from any redress in the civil justice system.** (Emphasis added) While I agree with the Court's approach in those cases where there is some doubt about the effect of the alleged malpractice, I believe it proves too much in those unusual circumstances where the convicted defendant can offer particularly probative evidence that there would have been no conviction but for the attorney's malpractice. Whether Peeler actually committed the crimes with which she was charged is – under these circumstances – irrelevant. Under her version of the facts, she certainly would not have been either indicted or convicted had she known about and accepted the government's offer of transactional immunity.

It is respectfully submitted, that guilt or innocence, is just as irrelevant in the Weddell matter, where it is the excessive sentence that is being questioned, and especially where the guilty plea was induced by fraud.

CONCLUSION

The protection afforded incompetent and/or negligent, and/or fraudulent attorneys is outrageous, and should be viewed as an insult to every conscientious attorney. The issue has been considered by several Circuit Courts of Appeal and by several State Supreme Courts and Appellate Courts, but there are conflicting views. For these reasons and the reasons set forth above, this Petition should be granted and the matter should be resolved once and for all.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLLAND WEDDELL, Plaintiff-Appellant, v. BRUCE HOCHMAN, an individual; HOCHMAN, SALKIN AND DEROY, a professional corporation, Defendants-Appellees,	No. 95-16116 D.C. No. CV-93-327-DWH
ROLLAND WEDDELL, Plaintiff-Appellant, v. BRUCE HOCHMAN, an individual; HOCHMAN, SALKIN AND DEROY, a professional corporation, and DOES 1 through 50, inclusive, Defendants-Appellees.	No. 96-15219 D.C. No. CV-95-119-DWH **MEMORANDUM*** (Filed Mar. 04, 1997)

*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted, November 6, 1996
San Francisco, California

Before: RONEY**, BEEZER and TROTT, Circuit Judges.

Appellant Rolland Weddell pled guilty to the misdemeanor offense of willful failure to file tax returns. He was represented at that time by Appellee Bruce Hochman. Weddell subsequently brought an action alleging negligence and legal malpractice against Hochman and Hochman's firm, Hochman, Salkin and DeRoy. The district court granted Hochman's motion to dismiss on the authority of the Nevada Supreme Court's opinion in *Morgano v. Smith*, 879 P.2d 735 (1994). Weddell was granted leave to amend. Weddell filed a second amended complaint, and at the same time, asked for leave to amend a third time. Hochman moved to dismiss again. While the district court considered the second amended complaint, Weddell filed a new action in which he alleged fraud and breach of fiduciary duty by Hochman. The district court dismissed the second amended complaint, without leave to amend a third time. At a later date, the new action was dismissed. Weddell appeals both dismissals. We affirm.

I

Weddell raises a constitutional claim for the first time on appeal in appeal No. 95-16116. Weddell argues that

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**The Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

the *Morgano* rule denies him his Sixth Amendment right to assistance of counsel. As a general rule, we will not consider issues raised for the first time on appeal, although it is within our discretion to do so. *Bolker v. Commissioner,* 760 F.2d 1039, 1042 (9th Cir. 1986). Weddell's argument is not compelling, and we see no reason to depart from the general rule.

II

Weddell appeals the district court's dismissal of the negligence and malpractice claims on the authority of *Morgano.* We review the dismissal without leave to amend de novo. *Dumas v. Kipp,* 90 F.3d 386, 389 (9th Cir. 1996).

In *Morgano,* the Nevada Supreme Court held that for a criminal defendant

> to state a claim for legal malpractice against private defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction *or sentence* was caused by something other than the plaintiff's own conduct. Specifically the plaintiff must plead that he or she has obtained appellate or post-conviction relief in order to overcome a motion for summary judgment or a motion to dismiss. Furthermore, in order to prevail at trial, the plaintiff must prove actual innocence of the underlying charge.

879 P.2d at 737 (emphasis added). Weddell attempts to avoid the rule of *Morgano* by arguing that the basis for his malpractice action is an "excessive" sentence resulting from Hochman's poor representation, not a claim of actual innocence of a crime for which he was wrongfully

convicted. This attempt is not sufficient to state an actionable claim because the Nevada Supreme Court's holding clearly applied to both convictions and sentences. *Id.*

The district court correctly held that *Morgano* applies to the facts of this case. Weddell was collaterally estopped from bringing a malpractice claim against Hochman because he had pled guilty to the charge of willful failure to file tax returns. *See United States v. Bejar-Matrecios*, 618 F.2d 81, 83 (9th Cir. 1980). Because the sentence was within the legal range, there are no circumstances under *Morgano* in which Weddell could prevail at trial in a legal malpractice action. *Morgano*, 879 P.2d at 737. The district court correctly applied Nevada state law, and we affirm the dismissal of Weddell's negligence and malpractice claims.

III

Weddell appeals the district court's refusal to grant leave to file a third amended complaint. We review the denial of a motion to amend a complaint for abuse of discretion. *Maljack Prods. Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996). The district court held that Weddell's motion should be denied because of: (1) undue delay another amendment would cause, (2) prejudice to Hochman resulting from more discovery, and (3) Weddell's failures to cure deficiencies in his prior filings. We agree with the district court's determination, and conclude that the court did not abuse its discretion.

IV

In appeal No. 96-15219, Weddell also raises the claim that application of *Morgano* denies the Sixth Amendment

right to assistance of counsel. For the reasons discussed in part I, we likewise decline to entertain this claim.

V

Weddell appeals the dismissal of his fraud and breach of fiduciary duty claims. We review the district court's dismissal without leave to amend de novo. *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996).

As noted above, Weddell pled guilty to willful failure to file income tax returns. Because of collateral estoppel, he cannot relitigate the underlying issues in this case. *Bejar-Matrecios*, 618 F.2d at 83. As the district court did, we conclude that the proximate cause of Weddell's prosecution and all alleged wrongs that occurred thereafter is Weddell's guilt. On this basis, Weddell's tort claims fail for lack of proximate cause. *See* Restatement, Second, Torts, § 430.

CONCLUSION

The district court's dismissal of Weddell's claims for negligence and legal malpractice (No. 95-16116) was proper. The district court did not abuse its discretion in denying Weddell leave to amend. The district court's dismissal of Weddell's claims for fraud and breach of fiduciary duty (No. 96-15219) was proper.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROLLAND WEDDELL, Plaintiff,

vs.

BRUCE I. HOCHMAN, and individual; HOCHMAN, SALDIN, AND DEROY, a Professional Corporation; and DOES 1 through 50, inclusive, Defendants.

CV-N-93-327-DWH

ORDER

(Filed 2, 1995)

Plaintiff Rolland Weddell brought suit against defendants for legal malpractice. The court dismissed (#43) Weddell's first amended complaint without prejudice for failure to state a claim of legal malpractice under *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994). Weddell filed a second amended complaint (#46), which defendants again move to dismiss for failure to state a claim (#48). Weddell also moves for leave to file a third amended complaint (#47).

FACTS

By his amended complaint (#18), Weddell alleges defendants, private attorneys, negligently represented him in a criminal matter. Weddell further alleges that the negligent representation caused his plea of guilty, a seven month prison sentence, and loss of income.

By his second amended complaint (#46), Weddell additionally alleges he obtained post-conviction relief following his release from custody. Specifically, United States Magistrate Judge Atkins found Weddell had been improperly canvassed when entering his guilty plea and improperly sentenced to a concurrent prison term on one of the counts to which he pleaded guilty, and that provisions of his sentence regarding payment of unpaid taxes required technical amendment. Thereafter, United States District Judge McKibben ordered the judgment amended, terminating "supervised probation," reducing Weddell's fines, eliminating restitution, requiring the government to agree to file no further charges related to the matter, and sealing the "Government's Sentencing Memorandum." ¶ 16. Finally, Weddell alleges he is innocent of the charge of which he was convicted – willful failure to file income tax returns for 1985 and 1986 – and pleaded guilty to the charge a second time, after being allowed to withdraw his prior plea, only "because he had already served his jail sentence and it would serve no purpose to go to trial except to increase his damages against Defendant, Hochman." ¶ 17.

By his proposed third amended complaint, Weddell additionally alleges defendant Hochman made a series of misrepresentations to Weddell regarding his criminal case, did not vigorously represent Weddell, and fraudulently induced Weddell into taking the "path of least resistance" to his conviction. ¶ 25.

ANALYSIS

I. Motion to Dismiss Second Amended Complaint

a) Standard of Review

Rule 12(b)(6) permits the defense of "failure to state a claim upon which relief can be granted" to be raised by motion. The traditional standard for a Rule 12(b)(6) motion is not to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992), *cert. denied sub nom., Manhattan Beach v. Buckey*, 113 S.Ct. 599 (1992). All allegations of material fact are considered true and construed in the light most favorable to the nonmoving party. *Buckey*, 968 F.2d at 794.

b) Legal Malpractice

As this court explained in its order dismissing Weddell's first amended complaint, the Nevada Supreme Court has held that "to state a claim for legal malpractice against private criminal defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction or sentence was caused by something other than the plaintiff's own conduct." *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994). Additionally, plaintiff must plead that he or she has obtained appellate or post-conviction relief in order to overcome a motion to dismiss, and must prove actual innocence of the underlying charge in order to prevail at trial. *Id.* at 737-38.

In their motion to dismiss, defendants argue Weddell is barred from proving his innocence of the underlying charge by collateral estoppel and judicial estoppel. Defendants request the court take judicial notice of documents in Weddell's criminal case, bearing the number CR-N-90-68-HDM. Specifically, defendants ask the court to take notice of the minutes of the court dated September 30, 1994, Mot. Dismiss. Ex. A, and the amended judgment in that case. *Id.* Ex. B. Similarly, Weddell submits with his opposition the magistrate judge's memorandum and order regarding his motions to correct sentence and to modify term and conditions of probation, Opp'n Mot. Dismiss Ex. 1, and the two documents submitted by defendants.

On a motion to dismiss, the court may take judicial notice of and consider facts outside the pleadings. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). In addition, the court may take judicial notice of its own records in other cases. Fed. R. Evid. 201(b); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). Thus, the court hereby takes judicial notice of the above documents from Weddell's criminal case. These documents establish Weddell originally pleaded guilty to charges of willful failure to file income tax returns for 1985 and 1986, but was improperly canvassed for that plea. The court later allowed Weddell to withdraw that plea. After the court advised Weddell of the consequences of a guilty plea, he again pleaded guilty.

Based on the above facts, defendants argue Weddell should be estopped from claiming he is innocent of the criminal charges. The doctrine of collateral estoppel "precludes the relitigation of those issues actually decided

and necessarily involved in the determination of the prior judgment." *United States v. Bejar-Matrecios*, 618 F.2d 81, 83 (9th Cir. 1980). In addition, "[t]he general rule is that the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea." *Id.* The Ninth Circuit has also stated, "Although it is settled law in this circuit that a guilty plea may be used to establish issue preclusion in a subsequent civil suit, preclusion has only been allowed where an element of the crime to which the defendant pled guilty . . . was at issue in the second suit." *United States v. Real Property Located at Section 18, Township 23, Range 9, Sunnyview Plat*, 976 F.2d 515, 519 (9th Cir. 1992). Estoppel is fair in such circumstances "[b]ecause a knowing and voluntary guilty plea constitutes an admission of all the material facts alleged in the indictment." *Bejar-Matrecios*, 618 F.2d at 84.

Under the above authority, the court finds Weddell is collaterally estopped from making his claim of legal malpractice against defendants. Weddell's plea of guilty to the criminal charges squarely encompasses and thus precludes litigation of an element essential to his legal malpractice claim: his innocence of the underlying criminal charge. Weddell argues he had no reason to go to trial because he had already served his complete seven-month prison sentence and his conviction was not a felony conviction. However, while not a felony, the charge for which he was convicted was nonetheless a serious charge, as evidenced by the fact Weddell was fined $10,000, of which he had paid $9,800 by the time of the amended judgment. Moreover, Weddell's asserted lack of incentive to plead not guilty did not render his guilty plea

unknowing or involuntary. Hence, he is precluded from relitigating his guilt of the criminal charge.

Accordingly, it appears beyond doubt Weddell con prove no set of facts in support of his claim of legal malpractice; thus, his second amended complaint should be dismissed with prejudice.[1]

II. Motion for Leave to File Third Amended Complaint

Weddell moves for leave to file a third amended complaint, in which he adds claims of fraud and breach of fiduciary duty based on defendant's representation of him in his criminal matter.

Federal Rule of Civil Procedure 15(a) provides that "leave to amend shall be freely given when justice so requires." The Ninth Circuit has set forth four factors to consider in determining whether leave to amend should be granted: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 798 (9th Cir. 1991). The decision need not be based on all of these factors. *See id.* "Repeated failure to cure deficiencies by amendments previously allowed is another valid reason for a district court to deny a party leave to amend." *McGlinchy v. Shell Chemical Co.,* 845 F.2d 802, 809-10 (9th Cir. 1988).

In *McGlinchy,* the plaintiffs initiated an action in February of 1984, alleging federal and state antitrust violations as well as breach of contract and related torts. 845

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[1] In light of the foregoing, the court finds it unnecessary to address defendants' arguments based on judicial estoppel.

F.2d at 805. They then filed an amended complaint, and later asked leave to file a second amended complaint to add several new defendants and new antitrust claims, which the district court denied. *Id.* The plaintiffs then filed an "amended first amended complaint." *Id.* In December of 1985, they attempted to amend the complaint again to add claims of fraud and negligent interference with contract, but the district court denied permission to amend. *id.* at 806. The Ninth Circuit affirmed the denial of leave to amend on the grounds of undue delay, prejudice, and repeated failure to cure deficiencies. *Id.* at 809-10.

The plaintiffs in *McGlincy* claimed they became aware of the newly proposed claims after engaging in discovery in May of 1995. 845 F.2d at 809. However, the Ninth Circuit found they should have been aware of those claims when they filed their original complaint, which included a claim for tortious interference. *Id.* Also, the plaintiffs did not give notice of their intention to amend until six months after they allegedly discovered the new claims, and they gave notice only after the original discovery deadline and after the original trial date had been vacated. *Id.*

Similarly, Weddell attempts to amend his complaint after discovery has closed and well after the original trial date in this matter. Weddell filed his original complaint on May 4, 1993 (#1), and filed an amended complaint on October 27, 1993 (#18). The trial was originally scheduled for July 26, 1994, but was continued until November 1, 1994 (#28). The court dismissed Weddell's amended complaint for failure to state a claim on October 27, 1994 (#43). Weddell filed his second amended complaint on

November 30, 1994 (#46), and on the same day moved for leave to file a third amended complaint (#47). Although Weddell claims to have become aware of the facts giving rise to the claims for fraud and breach of fiduciary duty "during preparation for trial, after discovery and motion cutoff," Mot. Amend. at 4, he does not substantiate this claim and he also contends these claims are based on the same evidence upon which his original claim for malpractice is based. *Id.* at 5. As in *McGlinchy,* he should have been aware of the new claims when he filed the original complaint. Thus, the court finds Weddell's delay to be undue.

Moreover, the court finds the amendment would unduly prejudice defendants. Despite Weddell's contention that "only the interpretation of the evidence will change," Mot. Amend at 5, "the new claims, especially fraud, would . . . require[] additional discovery on a wide range of new issues." *McGlinchy,* 845 F.2d at 809. Also, defendants are "entitled to rely on a timely close of discovery and a near-term trial date." *Id.* Prejudice to defendants is highlighted by this court's dismissal with prejudice of the original legal malpractice claim.

Finally, as in *McGlinchy,* Weddell's repeated failure to cure deficiencies by amendments previously allowed militates against allowing leave to amend. As is apparent, the new claims are proposed in a third amended complaint, and none of the previous complaints have stated a claim.

For the above reasons, the court will deny leave to file the third amended complaint.

IV. Defendants' Counterclaim

In their answers (#s 4, 19) to Weddell's original complaint and amended complaint, defendants assert a counterclaim against Weddell for $21,651.28 due and owing on the contract for defendants' services in Weddell's criminal case. Defendants have not answered Weddell's second amended complaint.

Federal Rule of Civil Procedure 13(a) provides, in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

To determine whether a counterclaim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, the federal courts employ a liberal "logical relationship" test. *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987). Under this standard, the court finds defendants' counterclaim to be logically related to Weddell's claim against them. Weddell's original complaint sued for defendants' malpractice in representing him, and defendants' claim is to enforce the contract securing that representation. Hence, defendants' claim is a compulsory counterclaim under Rule 13(a).

The Supreme Court has characterized a federal court's jurisdiction of a compulsory counterclaim as

ancillary jurisdiction. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1027 (9th Cir. 1992). Ancillary jurisdiction is codified under the name "Supplemental Jurisdiction" at 28 U.S.C. § 1367. A district court "may decline to exercise supplemental jurisdiction" when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3).

The court does not have original jurisdiction of defendants' counterclaim as the amount in controversy does not exceed $50,000. 28 U.S.C. § 1332(a). By this order, the court dismisses the claim over which it had original jurisdiction. The court will therefore decline to exercise supplemental jurisdiction over defendants' counterclaim and will dismiss it without prejudice.

Accordingly, **IT IS HEREBY ORDERED** that defendants' motion to dismiss (#48) is GRANTED: plaintiff's claims in his second amended complaint are DISMISSED WITH PREJUDICE;

IT IS FURTHER ORDERED that plaintiff's motion for leave to file a third amended complaint (#47) is DENIED;

IT IS FURTHER ORDERED that defendants' counterclaim is DISMISSED WITHOUT PREJUDICE.

DATED: This 3rd day of ~~April~~ May, 1995.

/s/ David W. Hagen
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

* * * * DISTRICT OF NEVADA

ROLLAND WEDDELL,

Plaintiff(s),

vs.

BRUCE I. HOCHMAN, ET. AL.,

Defendant(s)

/

JUDGMENT IN A CIVIL CASE

CASE NO. CV-N-93-327-DWH

(Filed May 4, 1995)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's [sic] verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's motion to dismiss (#48) is granted; plaintiff's claims in his second amended complaint are dismissed with prejudice.

May 4, 1995

LANCE S. WILSON, Clerk

By /s/ Connie S. DuBack
C. DuBack
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROLLAND WEDDELL,

Plaintiff,

vs.

BRUCE I. HOCHMAN, an individual; HOCHMAN, SALKIN, AND DEROY, a Professional Corporation; and DOES 1 through 50, inclusive,

Defendants.

_____/

CV-N-95-119-DWH

ORDER

(Filed Dec. 29, 1995)

Plaintiff Rolland Weddell sues defendants, attorneys who formerly represented Weddell in criminal proceedings, for fraud and breach of fiduciary duty (#1). Defendants move to dismiss for failure to state a claim (#8). Weddell has opposed (#12), and defendants have replied (#13).

FACTS

The court takes judicial notice of the entire file in another action brought before this court by Weddell against defendants – CV-N-93-327-DWH.[1] In that action,

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[1] *See* Fed. R. Evid. 201(b); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (court may take judicial notice of its own records in other cases); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (on motion to dismiss, the court may take judicial notice of and consider facts outside the pleadings).

Weddell sued defendants for legal malpractice. The court dismissed (#43) Weddell's first amended complaint without prejudice for failure to state a claim of legal malpractice under *Morgano v. Smith*, 879 P.2d 735, 737 (Nev. 1994). Weddell filed a second amended complaint (#46), which the court dismissed with prejudice for failure to state a claim (#53). In the order of dismissal, the court also denied Weddell leave to file a third amended complaint, which proposed to add the same claims of fraud and breach of fiduciary duty brought by the instant complaint (#53).

By his instant complaint, Weddell alleges defendant Hochman made a series of misrepresentations to Weddell regarding his criminal case, did not vigorously represent Weddell, and fraudulently induced Weddell into pleading guilty and thereby taking the "path of least resistance" to his conviction. ¶ 18.

ANALYSIS

A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.), *cert. denied sub nom., Manhattan Beach v. Buckey*, 113 S. Ct. 599 (1992). A court may dismiss a complaint pursuant to Rule 12(b)(6) for either of two reasons: (1) lack of a cognizable legal theory, or (2) the pleading of insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533 (9th Cir. 1984). All allegations of material fact are

considered true and construed in the light most favorable to the nonmoving party. *Buckey*, 968 F.2d at 794.

Defendants contend that Weddell cannot prevail on either of his instant claims – fraud and breach of fiduciary duty – because he is estopped from litigating the issue of his guilt of the underlying criminal charges, to which he pleaded guilty. Therefore, according to defendants, he cannot establish proximate causation of damages under either legal theory because his commission of the underlying crimes was the proximate cause of all of his alleged damages. Defendants cite *Weiner v. Mitchell, Silberberg, & Knupp*, 114 Cal. App. 3d 39 (1981) as support for their position.[2]

In *Weiner*, a former client sued a law firm and its members for malpractice, conspiracy, fraud and deceit, breach of fiduciary duty, and interference with prospective advantage, which allegedly resulted in his indictment for securities fraud and other damages. 114 Cal. App. 3d at 42-44. The trial court dismissed the action, and the appellate court affirmed. *Id.* at 45, 48. The appellate court held it was proper to take judicial notice of the pertinent facts and the judgment of conviction upheld in a Ninth Circuit opinion affirming the plaintiff's conviction. The court thus found that the criminal conviction of the plaintiff determined his guilt of many of the charges in the indictment, which, in turn, collaterally estopped

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[2] Defendants assert additional grounds upon which Weddell's complaint should be dismissed. Due to the following disposition of their motion, the court finds it unnecessary to consider those grounds.

the plaintiff from relitigating the issue of guilt in his civil action. The court then stated:

> [W]e must, therefore, accept as the proximate cause of [plaintiff's] indictment, and of all the damages which occurred to him by reason of it, his guilt and his guilt alone. This means that all of the various causes of action alleged in tort against defendants . . . founder on the complete lack of proximate causation between the torts alleged therein and the injuries plaintiff allegedly suffered thereby. Stated otherwise, without proximate causation between the torts alleged and the damages allegedly suffered, there can be no cause of action in tort.

Id. at 48.

Weiner is both persuasive and controlling of Weddell's instant action. As the Supreme Court of Texas recently noted in *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497 (Tex. 1995), "[N]early every court that has addressed the question of whether a convict may sue his or her attorney holds that, for reasons of public policy, the criminal conduct is the only cause of any injury suffered as a result of conviction" (citations omitted). Indeed, the above authorities are in accord with the Supreme Court of Nevada's holding in *Morgano*, 879 P.2d at 737, that "to state a claim for legal malpractice against private criminal defense counsel, the plaintiff must assert a basis for claiming that the plaintiff's conviction or sentence was caused by something other than the plaintiff's own conduct."

This court has already found it proper to judicially notice Weddell's plea of guilty in the underlying criminal

case, bearing the number CR-N-90-68-HDM. In this court's order dismissing Weddell's malpractice action, the court found that Weddell "is precluded from relitigating his guilt of the criminal charge." CV-N-93-327-DWH (#58) at 6. Any damages plaintiff allegedly suffered resulted from that guilt and that plea of guilty. Thus, defendants are correct in asserting that Weddell's instant claims must fail on the element of causation.

Weddell's attempt to distinguish *Weiner* is unpersuasive. Weddell argues that the plaintiff in *Weiner* was convicted after a trial on the merits, whereas Weddell pleaded guilty on the advice of defendants. However, the court found in Weddell's malpractice action that Weddell failed to show that his second plea of guilty was either involuntary or unknowing. CV-N-93-327-DWH (#58) at 6. Also, as the court also pointed out in Weddell's malpractice action, "[t]he general rule is that the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea." *United States v. Bejar-Matrecious*, 618 F.2d 81, 83 (9th Cir. 1980). Thus, Weddell offers no persuasive reason to distinguish his case from *Weiner*.

In short, it appears beyond doubt that Weddell can prove no set of facts in support of his claims of fraud and breach of fiduciary duty which would entitle him to relief.

Accordingly, **IT IS HEREBY ORDERED** that defendants' motion to dismiss (#8) is GRANTED; plaintiff's

claims in his complaint (#1) are DISMISSED WITH PREJUDICE.

DATED: This 29th day of December, 1995.

/s/ David W. Hagen
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

* * * * DISTRICT OF NEVADA

ROLLAND WEDDELL,

Plaintiff(s),

vs.

BRUCE I. HOCHMAN, ET. AL.,

Defendant(s)

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JUDGMENT IN A CIVIL CASE

CASE NO. CV-N-95-119-DWH

(Filed Jan. 2, 1996)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's [sic] verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion to dismiss (#8) is granted; plaintiff's claims in his complaint (#1) are dismissed with prejudice.

January 2, 1996

LANCE S. WILSON, Clerk

By /s/ Connie S. DuBack
C. DuBack
Deputy Clerk